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ABSTRACT

This paper traces legislative developments that affect equity in employment, either favorably or unfavorably. Through a review of federal civil rights legislation, it describes conflicts among federal laws and critiques public policymakers, constituency groups, and legislators by discussing specific problems in employment and their potential solutions. Conflicts between equity and employment practices are illustrated through an analysis of court cases. Examples of subjects discussed are seniority clauses in union contracts, employment testing, pregnancy and health-related benefits, bona fide occupational qualifications that serve to exclude, reasonable accommodation for religious beliefs, and the potential conflict between affirmative action regulations and nondiscrimination policies. (YLB)

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Research and Development Series No. 214

EQUITY FROM A BUSINESS, INDUSTRY, AND LABOR PERSPECTIVE

by

Irving Kovarsky

SUMMARY Vocational educators have grappled with equity as a problem and have espoused it as a cause since 1963 when Congress issued both an equity mandate and an equity challenge with the passage of the Vocational Education Act. This paper is one of seventeen reports commissioned by the National Center for Research in Vocational Education to meet the equity challenge through a multidisciplinary approach encompassing three perspectives—academic, vocational education, and special interest group advocacy.

The following paper traces legislative developments that affect equity in employment, either favorably or unfavorably. Through a review of federal civil rights legislation, the author describes conflicts among federal laws and critiques public policymakers, constituency groups, and legislators by describing specific problems in employment and their potential solutions. He illustrates the conflicts between equity and employment practices through an analysis of court cases. Examples of the subjects discussed are: seniority clauses in union contracts; testing; pregnancy and health-related benefits; bona fide occupational qualifications that serve to exclude; reasonable accommodation for religious beliefs; and the potential conflict between affirmative action regulations and nondiscrimination policies.

EMPLOYERS, UNIONS, AND FAIR EMPLOYMENT LEGISLATION

Introduction

Vocational educators should be concerned with employment legislation. Consider the high unemployment rates of populations seeking fair employment opportunities such as women, minorities, handicapped, disadvantaged, and so forth. The U.S. Department of Labor, Bureau of Labor Statistics for the second quarter of 1980 shows a total labor market (nonfarm) unemployment rate of 7.5 percent with 13.4 percent of all blacks and 10.2 percent of all Hispanics unemployed.* This statistic does not take into account underemployment or the development of vocational skills.

There are numerous federal employment mandates that relate to vocational education services for special populations—minorities, women, older, and handicapped trainees—as job seekers. As

* U.S. Dept. of Labor NEWS 80-477

vocational education programs serve increasing numbers of individuals from special needs populations, it is imperative that vocational educators establish communication with and develop an understanding of industry, organized labor and job seekers to maximize opportunity and success on the job. There must be an optimal mix of vocational education, job placement, and job success to best serve the national interest. This paper attempts to integrate the various laws and rulings pertaining to the disadvantaged in the job market.

The Backdrop

Congress only recently began to exhibit concern for equity in the workplace. Via the collective bargaining process, protected through enactment of the Wagner Act in 1935 and by employer-union agreements calling for arbitration, some help was extended to aging and handicapped employees entitled to seniority, pensions, and other fringe benefits. Designed to increase union power, the Wagner Act did little to help minorities and women and often proved a detriment. Some unions sought "fair play"—a definition of equity that I prefer—for minorities and women, but most were unconcerned, or in the case of the railroad brotherhoods, openly hostile. Unions negotiating contracts with employers calling for equal pay (but not equal work opportunity), actually practiced intentional or unintentional discrimination against women, knowing that employers would favor the employment of male and white job seekers over female and black job seekers.

Most collective bargaining agreements contain clauses that may be disadvantageous to the achievement of equitable employment opportunities including certain seniority provisions, fringe benefits, hiring halls, and union shops. In fact, the Wagner Act and the amending Taft-Hartley Act helped to create an employment environment that even today may perpetuate discriminatory practices

ABOUT THE AUTHOR

IRVING KOVARSKY is Professsor of Industrial Relations at the University of Iowa. He received his bachelor of law degree from Kent College of Law in Chicago, an M.A. in industrial sociology from Loyola University, and an M.A. in law from Yale. He completed a Ph.D. in labor relations at the University of Iowa where he is now teaching labor regulation, collective bargaining, personnel management, and law and discrimination in industry and employment. His impressive publication record includes books on the legal aspects of employment and testing; and race, sex, age, and health discrimination in employment and training. He has also published numerous articles in a variety of prestigious law and business journals and is an expert on legal concerns in fair employment.

that are "legal." Congress, in addressing the public need for union organization, unwittingly helped to create an environment that cannot be easily changed.

A shift in legislative policy toward protecting the employment rights of the economically disadvantaged started after World War II. For example, New York was the first state to enact a law protecting the employment rights of minorities; later, New York extended legal protection to other disadvantaged groups. Several states as well as the U.S. Congress followed this precedent without fully considering the needs of the disadvantaged or recognizing the limitations of political and judicial power. These state laws initially applied to employers and unions engaged in both inter and intrastate commerce. These state laws often proved ineffective because of the failure of complainants to bring charges, inadequate funding, difficulty of regulating employers and unions operating in interstate commerce, conflicting state regulations, conflicting legal interpretations, poor staffing, and a society reluctant to change.

After considerable political manipulation by President Johnson, Congress finally enacted a Federal Fair Employment Law in 1964. This law, Title VII, prohibits discrimination in employment practices on the basis of race, ethnic origin, religion, or gender. Today, private and public employers and unions are regulated by federal (and state) law banning discrimination if engaged in interstate commerce and employing fifteen or more employees.

The Federal Age Discrimination Employment Act (ADEA) enacted in 1967 and amended in 1974 and 1978, applies to employers with twenty or more employees engaged in interstate commerce. The Vocational Rehabilitation Act (VRA) of 1973, amended in 1974, was intended to help physicaily and mentally handicapped individuals seeking employment and able to work. Unlike Title VII and the ADEA, the VRA applies to all employers in private industry holding federal contracts in excess of $2,500 (section 503 of the law) and institutions receiving federal support (section 504).

This paper will concentrate on federal rather than on state law because federal law applies nationwide, and in some cases, there is duplication between state and federal law. Similar duplication or conflict may arise when two or more federal laws may be applied to the same situation. Such duplication and conflict may lead to confusion, inefficiency, and may be unfairly burdensome. Employers are required to follow affirmative hiring practices when engaged in federal contracts; however, some employers claim that giving a job to a handicapped person could mean that women and minorities are excluded from employment. The employer may fear the loss of federal contracts for failing to hire women and minorities. In addition, in attempting to comply with affirmative hiring practices as required by federal law, the employer may be in conflict with a union over the terms of a collective

bargaining agreement. Today, there is a strong call emanating from employers and others for less control in employment practices.

There is, unquestionably, greater acceptance today of the principles of fair hiring (equal employment opportunity), but affirmative hiring continues to be controversial. There are occasions when it is difficult to distinguish between fair hiring and affirmative hiring, which creates a conflict for decision makers. Few employees are willing to accept affirmative hiring when it hits them directly in the pocketbook. But the groups protected by equal rights legislation believe that progress is too slow, if not impossible, without preferential employment practices. They view these preferential practices as equitable, because they hold society responsible for past and present inequities. There is no segment of society, including complainants, that cannot be faulted for the present dilemma.

Those facing employment problems fault employers, unions, and government for ignoring their needs. Employers, in turn, shift blame to unions and government, citing corruption, inefficiency, and featherbedding practices as examples to support their position. Unions, in turn, blame employers, government policy, and lackadaisical law enforcement.

Culpability can be parceled out as follows:

1. Progress under the best of circumstances is bound to be slow and rocky, as equity in employment is tied to home environment, religion, schools, motivation, training, and economic upswing and recession. Too much reliance is placed on legislation and the courts to trigger meaningful changes, which overlooks human and societal factors. For example, poorly educated blacks are going to experience employment difficulty even in a friendly environment. The black community correctly points a composite finger at white hostility and the unavailability of quality education, but there is also a failure on the part of the black community to accept some of the responsiblity. Black students too often fail to take advantage of educational opportunities because their motivation to learn, conditioned by peers, is absent. In view of these circumstances, perhaps there is a need to change both white and black attitudes.

2. Policy makers and society are reluctant to accept reverse employment discrimination, which is essential to ending inequality in employment opportunity and to protecting the limited progress made. For example, judges often take the position that the Constitution is color-blind, meaning it protects all people of all races equally. These judges fail to acknowledge that

the drafters of the Constitution were sometimes prejudiced and engaged in blatant racial and political compromises.

3. The overall lowering of standards of acceptable performance has decreased the quality of education in this country.

4. The politics of special interest groups and political parties often spill over into our judicial system. For example, whereas some claim that the federal judicial system is free of political influence, the system used to appoint judges and the philosophical reasons for which judges are appointed or turned down are undeniably political. Similar political considerations are exhibited when arbitrators are chosen by employers and unions for their predictable social and economic views rather than for their expertise.

5. Employers and unions are too frequently reluctant to accept even limited change.

This brief introduction was necessary to display the prejudice of the author and to supply a framework for subsequent discussion and recommendation for change and research. It may be helpful to acknowledge that meaningful change toward a goal which may appear to be unattainable requires herculean effort. These changes are supportable. In terms of equity as an ideal, they are admittedly less than nirvana. Lesser change is at least a step in the right direction. Practice the art of bunting rather than hitting the home run.

SPECIFIC PROBLEMS AND EQUITABLE EVALUATIONS

Seniority

Employees frequently benefit from seniority clauses found in collective bargaining agreements. Seniority clauses reward loyal, longtime employees. Seniority provisions are used to determine promotion, layoff and recall, choice of shift, and so forth. Seniority, however, is not provided for by law and is essentially dependent on a collective bargaining agreement.

Most collective bargaining agreements contain seniority clauses, permitting the advantaged to acquire additional advantage, usually at a cost to the disadvantaged. Under section 301 of the Taft-Hartley Act, these seniority clauses are legal unless it can be proven to the satisfaction of the court that constituents in the bargaining unit are not fairly represented as in the case of *Vaca v. Sipes* and *Hines v. Anchor Motor Freight Company*. When the fair representation doctrine under section 301 was developed in the courts, the federal fair employment laws had not yet been enacted, and society was less willing to tolerate fair employment. Furthermore, the same seniority clauses could be used to protect disadvantaged individuals who were employed and it was not clear that change was essential to ensure fair play. This fact assumes considerable importance today if fair hiring and affirmative protection are accepted as desirable goals.

Before 1974, the start of an economic recession in the United States, most, if not all, seniority cases going to the courts involved Title VII and promotion. Since 1974, complaints have concerned the inequitable effects of seniority on layoff and recall, an especially bitter pill to swallow for blacks and women. (Seniority clauses can, however, protect *employed* women and aging and handicapped individuals.)

During the 1960s, another fact caused problems for the black job seeker. Increasing numbers of women elected to remain permanently in the labor force, competing with blacks for available jobs. The competition was particularly strong for white collar jobs.

The decision made by the Supreme Court in *Teamsters Union v. U.S.* under Title VII addressed the question of the legitimacy of seniority clauses that have a negative effect on minorities, most notably women and youths. The Supreme Court decided that a seniority clause is "bona fide" unless satisfactory evidence can be introduced indicating that the firm and union intended to discriminate at the time the contract was negotiated. While there was evidence in *Teamster Union* that the plaintiffs seeking jobs faced intentional discrimination, there was no evidence that the seniority clause was similarly inspired. The *Teamster Union* case stands for the proposition that only in rare instances will a court refuse to follow the seniority

provision, a burdensome state of affairs during an economic turndown. In terms of equity, minorities and others would be better off if seniority clauses that have a statistically negative impact, and that are a sign of unintentional discrimination, were ruled illegal. Yet proving intentional discrimination is extremely difficult because seniority provisions do serve legitimate purposes.

The most recent and far reaching seniority decision made by the Supreme Court is *Weber v. Kaiser Aluminum & Steel Workers Union*. The employer and union negotiated an agreement creating separate black and white seniority lines to secure appointments to several training programs leading to skilled jobs. The employer held contracts with the federal government which required affirmative hiring and promotion. In comparision to their representation in the population of that locale, blacks were underemployed in both the unskilled and skilled job categories. The plaintiff, who was white, had more seniority than blacks admitted to the training program, but not enough seniority to qualify as a white trainee. Consequently, the plaintiff claimed a violation of Title VII, specifically pointing to sections 703 (d) and (j), which outlaw reverse discrimination and the benign quota. No evidence was introduced that the employer had engaged in discrimination in the past.

The district and appellate courts found that the seniority system established by employee-union agreement violated section 703 (d), which bans discrimination in "apprenticeship or other training. . ." programs, and section 703 (j), which outlaws preferential treatment to overcome the current impact of past discrimination. The Supreme Court, reversing the lower court's decision ruled that Title VII does not prohibit voluntary agreements between employers in private industry and unions to promote positively the well-being of those traditionally facing discrimination. (Note that the decision in *Weber* was not made under the Fifth or Fourteenth Amendments, as in the *Bakke* decision made by the Supreme Court in 1978.)

The Supreme Court in *Weber* painfully reasoned, to justify its decision, that section 703 (j) was only aimed at reverse discrimination practiced by government and not private industry. If Congress intended to outlaw private reverse discrimination, specific language was needed. To achieve a measure of equity, it seems that the Supreme Court did not follow congressional will.

Justice Brennan, who wrote the leading opinion in the case, designated several critera to measure the legitimacy of the privately negotiated benign quota system:

1. A white employee holding a job cannot be displaced by a black employee.

2. The collective bargaining agreement must not "unnecessarily trammel upon the interests of white employees."

3. The agreement is illegal if all white employees are excluded from training.

4. The benign agreement must be temporary, ending as soon as racial balance is established in the employer's work force.

The Supreme Court decision in *Weber* is important because it established that temporary plans to promote the welfare of minorities are legal, a significant shift from prior legal opinions. But *Weber* raises many unanswered questions, including the following:

1. Are benign plans legitimate only when negotiated by employers and unions?

2. When is a benign plan voluntary and when is it involuntary? After all, there was some federal pressure in *Weber*, as the employer held federal contracts calling for affirmative action.

3. Should the same guidelines be followed when there is a religious, ethnic, or sexual imbalance in the employer's work force?

4. Will the same legal approach be applied under the federal age discrimination act?

Employment Testing

The Duke Power Company decision of 1971 was unanimous, an unusual occurrence, and is unquestionably one of the most important decisions made in recent years. The impact of this decision will be felt for many years to come, because in this case, the Supreme Court may have been more concerned with an equitable result than with the language in section 703 (h) pertaining to testing.

In Duke Power Company, black employees could transfer from the general labor department to better paying jobs in other departments if they had a high school diploma or could pass an aptitude and intelligence test. Unfortunately, more blacks than whites failed to complete high school at this time, and blacks frequently failed the required tests.

The Supreme Court ruled that employers promoting employees on the basis of test results do not violate Title VII if "business necessity" is established and the tests are properly validated. When these two standards are not met, employers relying on tests violate the law whether there is intentional or unintentional discrimination. Unintentional discrimination was established in *Duke Power Company* because blacks failed the tests more frequently than whites. Not only did

the Supreme Court question the validity of the relationship between test scores and potential job performance, but the need for high school diplomas was also questioned because employees without them performed ably for the defendant. To be considered valid, tests must be geared to job descriptions, and employees scoring well should prove to be the most efficient on the job. Most tests used by employers are not related to job descriptions because they are prepared by a testing service, and often there is no correlation between performance on the test and on the job.

Duke Power Company is a racial discrimination case; however, female, aging, and handicapped job seekers may also perform less satisfactorily on industrial tests. For example, women may seek employment after their children mature. These woman may "bomb" when tested because they have been away from the classroom and the job for many years. Handicapped individuals may score poorly on tests because they have been sheltered in separate schools and have received a different education. Many of the tests used in industry are intended to measure intelligence and aptitude. Because we have not yet devised accurate measures to differentiate among pure intelligence, aptitude, past experiences, and the motivation to learn, tests at best measure only past experience, motivation, and opportunity.

Women, until recently, were encouraged to concentrate on areas of study considered "female" learning, which limited their opportunities in the job market. The *Duke Power Company* decision is an interpretation of Title VII and applies to women tested for jobs. Whether the same approach is applicable under the ADEA and VRA is unknown. The two pieces of legislation do not mention testing, although such an equitable approach appears desirable. The decision in *Duke Power Company* can be supported as a measure for effecting equity.

There is some concern that even under Title VII, the Supreme Court is pulling back from the strong position it took in *Duke Power Company*. In a recent decision in *Washington v. Davis*, the Supreme Court seemed to lessen the stringency of the requirements by which tests can be validated and related to job descriptions. Blacks taking a verbal facility test failed frequently and claimed an unintentional violation of Title VII. The Court ruled that the test was properly validated because those who scored high on the test also performed well in training at the police academy. Whether the test is job related depends only partially on training in school—a test is validated only after performance on the job.

Pregnancy and Health Related Benefits

Today, more than 50 percent of all women of working age are part of the labor force. Some employers claim that hiring women creates many personnel

problems such as excessive absenteeism (especially among those women with young children), maternity leave and the additional cost of maternity benefits. They also claim that hiring women precludes hiring minority males; this appears to be nothing more than artful dodging, as these same employers only reluctantly hire blacks.

Evidence is available that female employees holding low level and blue collar jobs make greater use of health and sick leave benefits than men. In *Gilbert v. General Electric Company* the employer estimated, and the Supreme Court accepted, that insurance costs would increase by 170 percent if pregnancy benefits were provided. In this case, the Supreme Court decided that Title VII did not mandate the payment of pregnancy benefits. The Supreme Court noted that the benefits provided for women already exceeded in cost those provided for men.

Substantial additional costs to employers are usually treated as a legitimate reason for creating an exception, permitting sex discrimination in the absence of clear congressional direction. Because of *Gilbert*, in 1978, Congress amended Title VII, prohibiting the exclusion of pregnancy related benefits if other hospital and sick leave benefits are provided for employees. Thus the cost of providing insurance and sick leave benefits is no longer a valid reason for denying these fringe benefits to women. The 1978 amendment is probably equitable, but many employers feel that the additional costs are unjust. Employers could end all hospital and sick leave benefits provided for all employees, but that kind of change would not be popular among employees or with unions.

Bona Fide Occupational Qualifications (BFOQs)

Title VII and the ADEA permit bona fide occupational qualifications (BFOQs) when employers, who bear the burden of proof, convince courts of business justification. Employers entitled to a BFOQ can legally discriminate without violating Title VII and the ADEA. The VRA does not mention the BFOQ, and it seems that Congress intentionally denied such a defense to force employer evaluation of the individual who is handicapped. Silence is not conclusive evidence of congressional intent, and it remains possible that courts could read a BFOQ into the VRA. However, since Congress was aware of the BFOQ in other fair employment legislation, it is more logical to assume that Congress intended to deny its use under the VRA.

There are instances in which employers are clearly entitled to a BFOQ, but many claims fall within the proverbial grey area. For example, BFOQs permitting sex discrimination are in order when casting a play. Casting the roles of Romeo and Juliet is a good example. Women cannot claim sex discrimination if the director insists upon hiring a male Romeo. A sixty-year old actress cannot claim

age discrimination if refused the role of Juliet. However, it is less clear whether there is race discrimination if a talented and young actress is not hired to portray Juliet because she is black. If a fine actor in a wheelchair seeks the role of Romeo, the VRA would not be violated because a physically active hero is required, but suppose an extremely talented, handicapped actor sought the role of King Lear?

Employers may seek BFOQs to fill sales jobs requiring extensive travel and absence from home, claiming that women on the road would be compromised, their family life disrupted, their children unsupervised, and so forth. Although these claims may be true, sex discrimination is obvious. These same liabilities hold true for men. The employee's personal life is not the employer's concern unless efficiency in the job is impaired.

One case has reached the Supreme Court under Title VII involving sex discrimination and entitlement to a BFOQ. In *Dothard v. Rawlinson*, the plaintiff, a female, was denied employment as a prison guard. Because four of the maximum security prisons in Alabama housed male convicts and only one female convicts, and because guards of the same sex as the prisoners were appointed to the prisons, male job applicants were more likely to be hired than female applicants. In addition, the plaintiff contended that the minimum weight and height standards for prison guards would bar substantially more women than men from employment. Despite the willingness of the plaintiff to assume risks, the prison officials claimed entitlement to a BFOQ, pointing to the physical nature and danger of the job.

The Supreme Court concluded that the minimum height and weight standards were not job related; there are small people who are stronger than large people, and more women than men would be unnecessarily excluded under the Alabama regulations. Based on *Dothard*, it seems reasonable to conclude that few, if any, height and weight standards can be legally supported under Title VII. This is an equitable adjustment for women and those ethnic groups such as Hispanics and Asians, that tend to be small in stature. The Supreme Court in *dictum*, noted that some jobs, including positions such as prison guards, require strength and agility. In these instances, minimum standards related to the job are legitimate. For example, guards could be required to run a mile in eight minutes, scale a fence, and lift seventy-five pounds or more if such abilities were related to successful performance on the job. While these minimum standards would exclude more women than men, the job probably necessitates these physical skills. Individuals must be given an opportunity to demonstrate fitness, even if women are less likely to qualify than men.

The second question raised in *Dothard* was the validity of the Alabama policy of placing male guards in male prisons and female guards in female prisons. The Supreme Court indicated that most male prisons are obliged to hire female guards.

But the Alabama prison was an exception, entitling authorities to a BFOQ, because twenty prisoners were kept in each dormitory cell, with open toilets and showers. Additionally, guards were called upon to enter cells to stop violence, conduct searches, and so forth. (Most jails house one to four in a cell, and in those circumstances female guards could not be excluded.)

The ADEA promotes the "employment of older persons based on their ability rather than age," but employers are entitled to a BFOQ when able to show that the job requires younger people or that the individual applicant is physically or mentally unfit. The VRA, on the other hand, does not mention the BFOQ, although medical evidence can be introduced by the employer establishing the inability of the complainant to handle the job. Chronic disabilities typically multiply and increase in severity with age. Although chronic ailments cannot be cured, drugs and other treatments are available that permit efficient performance on the job.

There are jobs requiring considerable agility and endurance that preclude, for example, the amputee over forty being hired because the ADEA permits a BFOQ. Actually, the growth in new jobs since World War II had been in the white collar sector and amputees can perform these jobs efficiently. BFOQs under Title VII and the ADEA are not to be granted unless they are essential. Since the VRA calls for individual evaluation, attention should be given to rehabilitation possibilities, including surgery, psychological adjustment, stump care, and proper fitting of and training in the use of the prosthetic device.

The VRA broadly describes the "handicapped" person entitled to protection as one with (1) a physical or mental impairment which substantially limits one or more of such person's major life activities (employment is a major life activity), (2) a record of such impairment or (3) one who is regarded as having such an impairment. The definition of handicap under the federal law is broader than in many state laws, protecting not only those currently disabled but also those who are cured or have been wrongfully diagnosed as disabled. Firms holding federal contracts are required to hire "qualified" people "capable of performing. . . with reasonable accommodation." Unless such accommodations are considered arbitrary (usually measured by cost), employers are obliged to provide "reasonable accommodation." For example, while the placement of a rod to operate the push buttons in an elevator would be required under the VRA as "reasonable accommodation," the installation of elevators would be costly and would probably not be required.

Two cases have reached the Supreme Court, under the Fourteenth Amendment and the ADEA, dealing with the employment rights of aging employees (no case has gone to the Supreme Court under the VRA). As a general proposition, the physical fitness and age standards set by employers must be job related—age has

been equated to physical fitness even when not pertinent. Personnel departments must relate age hiring standards to each specific job.

In *Murgia v. Mass. Board of Retirement,* uniformed state police were required to retire at the age of fifty. The physical and mental health of the retiree was considered inconsequential. Compulsory retirement at fifty years of age was justified by the nature of the job, which often involved patrolling highways and serving as backup help to curb riots in prisons. The plaintiff, a high ranking police official, questioned the constitutionality of compulsory retirement at fifty years of age. He pointed to his efficiency, his excellent health, and to the fact that police in other cities and states are not required to retire until age sixty to sixty-five. The Supreme Court did not find a violation of the Fourteenth Amendment because states are not required "to determine fitness more precisely" by evaluating the health of the individual officer. The Supreme Court conceded that individual assessment was a better means of measuring physical capability, but states are not required to use the best available techniques. The concept of equity is offended by the Supreme Court reasoning—yet this reasoning is understandable in terms of promoting states' rights and limiting judicial interference with government regulation.

The Supreme Court requires at least two levels of proof when considering constitutional questions. In racial cases, the Supreme Court follows the rigid scrutiny test—that is, for a state to justify legislation or policy which is racially discriminatory, evidence must be produced indicating a need for and the unavailability of a more satisfactory approach. In age and handicap cases, the Supreme Court evidently follows the rational basis test, i.e., if there is some justification for the discriminatory legislation, it is constitutional and cannot be closely scrutinized by the courts. (Sex discrimination may be legislation constitutionally scrutinized by following an intermediate standard, one between the rational basis and rigid scrutiny tests.)

Supreme Court in *Murgia* decided that the purpose of mandatory retirement at fifty years of age was not irrational. Legislators are not required to adopt the most effective measure, providing the purpose is legitimate. Obviously, it is more difficult to convince courts that a constitutional breach has been perpetrated under the rational basis test than under the rigid scrutiny test. Under the rational basis test, however, it seems proper to conclude, as a matter of equity, that the earlier the age of retirement, the more convincing the evidence should be to justify the legislation.

The constitutionality of the Massachusetts legislation is suspect even under the rational basis test for the following reasons:

1. The Supreme Court, without analysis or sufficient documentation, accepted the claim made by Massachusetts that highway police could be assigned to

quell unusual difficulties in "prison and civil disorders, . . .patrol highways. . ., investigate crime, apprehend criminal suspects, and provide backup support for local police forces." An explanation of why the police highway job is more demanding in Massachusetts was not offered, nor was there any mention made of city police who do not retire until sixty years of age and beyond. (At the very least, the Supreme Court should have demanded tangible evidence supporting this assertion.)

2. To be rational and to justify compulsory retirement at the age of fifty, all police job descriptions and assignments require review. It seems logical to assume that rank-and-file police officers are more likely to face danger and undertake physically demanding assignments than high ranking police officers. On television, the ranking police officers, for example Kojak, are always exposed to danger and chase the wrongdoers, but in actual practice this is unlikely. The plaintiff in *Murgia* was a high ranking management official, and for him, danger on the job was improbable. The plaintiff was an official presumably appointed for honesty, intelligence, dedication, experience, knowledge, training, leadership, and similar qualities, rather than physical prowess. After all, not all police jobs require the same abilities.

3. The defendant in *Murgia* offered the expert testimony of three doctors who believed that police work should be performed by officers less than fifty years of age. More support is needed, however, to justify the Massachusetts legislation than the testimony of doctors who support or are hired by the defendant. Other experts may take the view that chronological age does not reflect physical well-being; rather, education, diet, exercise, heredity, medical care, and environment are more important influences.

But such is the nature of the judicial process. While legal consistency is considered to be of the utmost importance, all too often it is not demonstrable.

It was inevitable that the question of compulsory retirement would return to the Supreme Court, especially after 1974 when the ADEA was amended to cover state and federal employment. In fact, the 1978 amendments to the ADEA no longer permit the "bona fide retirement plan," which sanctioned compulsory retirement before sixty-five years of age. Today, compulsory retirement before seventy years of age is out of order unless employers can establish entitlement to a BFOQ or the individual employee cannot perform the job satisfactorily.

In *Vance v. Bradley*, the Supreme Court in 1979 considered the question of foreign service officers in the State Department. At the time, they were required to retire at sixty years of age. Today, there is no compulsory retirement at any age for most federal civil service jobs. The Supreme Court, under the Fifth Amendment and

ADEA, was unwilling to interfere, noting that most officers served overseas, and the jobs were performed under hazardous and arduous conditions.

Private employers are not usually permitted to claim a BFOQ because of age, a result of the intent of Congress. This is an equitable position in a society in which people live longer and medical knowledge eases or cures physical illness and mental burdens. When government fixes age standards, there is a reluctance on the part of the Supreme Court to substitute its opinion for standards established by legislation or executive order. Thus what is legitimate in private industry may be forbidden in public employment.

Reasonable Accommodation

Title VII requires employers to make "reasonable accommodation" for the religious beliefs of employees. For example, Jews and Seventh Day Adventists celebrate the weekly Sabbath from Friday sundown to Saturday sundown, rather than on Sunday. During the winter months, when darkness comes early, Jews and Seventh Day Adventists may wish to leave early on Friday. Employers, if possible, must try to accommodate such religious principles. Some employers, however, object to altering working hours, and the Supreme Court interpretation of "religious accommodation" makes it easy to justify refusals, minimizing employer motivation to provide "accommodation."

In *TWA v. Hardison*, the plaintiff celebrated the Sabbath on Saturday and sought "accommodation" for his religious beliefs. The seniority clause in the collective bargaining agreement obligated the plaintiff to work on Saturday. The defendant refused to pay the overtime rate to a substitute employee or to permit the plaintiff to otherwise shift working hours after other employees refused to substitute. The Supreme Court ruled that the defendant had attempted to accommodate the plaintiff and was not required to incur overtime expenses considered unreasonable. It is difficult to believe that a large operation like TWA could not make some adjustment in employee schedules. This is particularly true since the company operates on Sunday, a day the plaintiff was willing to work.

Employers are not required by law to accommodate women with young children. Equitably, such accommodation, if reasonable, might be desirable, but the VRA requires "reasonable accommodation" for the handicapped, while the ADEA does not mention accommodation.

Executive Orders and Affirmative Action

One of the most controversial and difficult tasks facing employers is compliance with the dictates of affirmative hiring and promotion. Title VII and the ADEA only call for fair employment, although an affirmative hiring penalty can be imposed once it is determined that violations have occurred. The VRA, on the other hand, requires employers to hire fairly and affirmatively. Executive orders issued by presidents since Johnson, applying to holders of federal contracts in excess of $10,000, require employers to recruit minorities and women affirmatively. In reality, affirmative recruiting is absent only for aging citizens and members of religions traditionally facing discrimination. In all other cases, affirmative hiring and recruiting are required by law or executive order.

Employers and others criticize the call for affirmative hiring, claiming that the less efficient are rewarded, innocents are economically punished for the past wrongdoings of others, morale in the plant is damaged, and reverse discrimination is prohibited by law and the Constitution.

Affirmative hiring does not require the reverse discrimination forbidden by the Constitution and section 703 (j) of Title VII. Affirmative action can be interpreted to mean that extra effort is required of employers to find the economically disadvantaged, but the incapable and less efficient need not be hired. Thus employers hire the disadvantaged only if they are of superior or equal ability to others seeking employment. In this fashion, courts avoid tangling with the difficult constitutional question of reverse discrimination. Another way of looking at affirmative employment is to treat these undertakings as goals to be achieved.

SUMMARY AND RECOMMENDATIONS

Court cases related to seniority, employment testing, pregnancy and health benefits, bona fide occupational qualifications, and religious accommodation have been a central focus of this paper. These same problems can be considered in terms of the education community.

1. Educators should consider establishing communication networks with leaders in unions and industry to create an atmosphere of fair play.

2. Vocational educators should restructure course content to include current information about employment rights and government regulations affecting business and industry.

3. Vocational education programs should be geared to future demands for skilled labor. Supervisory and midmanagement training programs should be developed from a philosophy having equity as a central concern.

4. Programs should be developed to provide legal training for those who advise the economically disadvantaged.

5. Training should be provided for vocational students in the art of taking employment tests.

ACKNOWLEDGMENTS

Before vocational educators can adequately meet the special needs of special groups, they must be committed to a philosophy of equitable education. The issue of equity in education has received a great deal of attention over the last ten years from the legislative, judicial, and academic sectors. As a result of this attention, research and analysis have shown that the term "equity" has a different connotation for nearly everyone who has attempted to define and apply it to educational programs. In addition, a host of related terms such as equality, disparity, and discrimination are a part of the vocational educator's daily vocabulary.

In an attempt to help vocational educators to articulate a definition of equity, the National Center for Research in Vocational Education has commissioned seventeen papers on equity from three broad perspectives—academic, vocational, and special needs. The authors in each of the three groups provide their own perceptions of and experiences with equity in education to bring vocational educators to a better understanding of this complex but timely issue.

The National Center is indebted to these seventeen authors for their contribution to furthering research on equity in vocational education.

We are also indebted to Dr. Judith Gappa, Associate Provost for Faculty Affairs at San Francisco State University for reviewing and synthesizing all seventeen papers. Special thanks also go to Cindy Silvani-Lacey, program associate, for coordinating the papers and to Regina Castle and Beverly Haynes who spent many hours typing manuscripts.

Robert E. Taylor
Executive Director

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